HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

124994-S

STATE OF MICHIGAN

IN THE SUPREME COURT

JOHANNA WOODARD and STEVEN WOODARD, Individually, and JOHANNA WOODARD as Next Friend of AUSTIN D. WOODARD a Minor,

Plaintiffs/Cross-Appellants,

-vs-

JOSEPH R. CUSTER, M.D.,

Defendant/Cross-Appellee,

and

JOHANNA WOODARD and STEVEN WOODARD, Individually, and JOHANNA WOODARD as Next Friend of AUSTIN D. WOODARD a Minor,

Plaintiffs/Cross-Appellants,

-vs-

UNIVERSITY OF MICHIGAN MEDICAL CENTER,

Defendant/Cross-Appellee.

/

Supreme Court Nos.: 124994
124995

Court of Appeals No.: 239868
Washtenaw County Circuit Court
Case No.: 99 5364 NH

CASE CONSOLIDATED AND JOINED WITH:
Court of Appeals: 239869

Court of Claims: 99-017432 CM

CRAIG L. NEMIER P26476
Attorney for Plaintiffs/Cross-Appellants
37000 Grand River Avenue, Suite 300
Farmington Hills, Michigan 48335
(248) 476-6900

KEVIN P. HANBURY P39468
Attorney for Defendants/Cross-Appellees
30850 Telegraph Road, Suite 200
Bingham Farms, MI 48025
(248) 646-1514

/

DEFENDANTS/CROSS-APPELLEES' SUPPLEMENTAL BRIEF ON PLAINTIFFS/CROSS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL (DOCKET # 124995)

RELIEF REQUESTED

PROOF OF SERVICE

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC
KEVIN P. HANBURY (P39468)
Attorney for Defendants/Cross-Appellees
30850 Telegraph Road, Suite 200
Bingham Farms, MI 48025
(248) 646-1514

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

TABLE OF CONTENTS

PAGES

INDEX OF AUTHORITIES.....ii

SUPPLEMENTAL ARGUMENT RE: PLAINTIFFS/CROSS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL (DOCKET NO. 124995).....1

RELIEF REQUESTED.....8

PROOF OF SERVICE.....9

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

INDEX OF AUTHORITIES

CASES **PAGES**

Grossman v. Brown,
470 Mich. 593, 685 N.W.2d 198 (2004) 1, 2, 3

Halloran v. Bhan,
470 Mich. 572, 683 N.W.2d 129 (2004).....1, 4, 6

Tate v. Detroit Receiving Hospital,
249 Mich. App. 212, 642 N.W.2d 346 (2002).....4, 6

STATUTES

MCL 600.2169.....1, 2, 3, 4

MCL 600.2912d.....3

MCL 600.2912d(1).....1, 2, 3

MCL 600.2169(1)(a).....5

MCL 600.2169(1)(b)(i).....5

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

This supplemental brief is submitted pursuant to this Court's order dated October 7, 2004, which, in lieu of granting leave to appeal, directed the Clerk of the Court to schedule oral argument to determine whether leave should be granted or other peremptory action taken under MCR 7.302(G)(1), and provided that the parties would have twenty-eight days to file supplemental briefs.

In their Cross-Application, plaintiffs' seek reversal of the Court of Appeals' affirmance of the trial court's ruling that plaintiffs' expert, Dr. Anthony Casamassima, was unqualified to testify with respect to pediatric intensive care standard of practice under MCL 600.2169. Supplemental appellate analysis must necessarily begin with reference to this Court's recent decisions in *Grossman v. Brown,* 470 Mich. 593, 685 N.W.2d 198 (2004) and *Halloran v. Bhan,* 470 Mich. 572, 583 N.W.2d 129 (2004), both of which construed the provisions of MCL 600.2169.

In *Grossman, supra,* this Court considered the issue of "whether plaintiff's attorney had a reasonable belief under MCL 600.2912d(1) that plaintiff's medical expert satisfied the expert witness requirements of MCL 600.2169 in order to sign plaintiff's affidavit of merit." *Grossman,* 470 Mich. at 595. The defendant, Dr. Otto Brown, was board certified in general surgery, and had "a certificate of special qualifications in vascular surgery." *Id.* The author of plaintiff's affidavit of merit, Dr. Alex Zakharia, who was board certified in general surgery (but had extensive experience doing vascular surgery) lacked certification of special qualification in vascular surgery. *Id.* at 597.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

Reviewing plaintiff's counsel's efforts to investigate defendant Brown's credentials[1], this Court unanimously concluded that plaintiff's counsel in *Grossman* had reasonably believed that Dr. Zakharia was qualified under sec. 2169 to author an affidavit of merit. The *Grossman* majority opinion noted that a plaintiff must obtain the opinion of a medical expert at two stages in medical malpractice litigation – first when the Complaint is filed (under MCL 600.2912d(1)), and second at trial. *Id.* at 598. At the affidavit of merit stage, the plaintiff's attorney need only have a "reasonable belief" (again pursuant to MCL 600.2912d(1)) that the expert is qualified. *Id.* At trial, the "more demanding" standard of MCL 600.2169 (a witness "shall not give expert testimony" unless the specific criteria of section 2169 are met) applies. *Id.* at 599. The *Grossman* majority observed that the disparity in the standards applicable at the two stages in litigation was grounded in legislative recognition of the fact that, prior to the filing of a lawsuit, plaintiffs have no opportunity to conduct discovery and have recourse only to "publicly accessible resources" to obtain information with respect to a potential defendant's medical specialization and board certifications. *Id.*

Justice Taylor's majority opinion noted that the controversy in *Grossman* concerned only the initial "affidavit of merit stage." *Id.* at 599. The opinion observed that "[i]t may be that what satisfies the standard at this first stage will not satisfy the requirements of MCL 600.2169 for expert testimony at trial." *Id.* at 600. Thus, the majority expressly did not reach the issue of whether, at the time of trial, "board

[1] Plaintiff's counsel, Mr. Sam Meklir, emphasized that he had consulted the AMA (American Medical Association) website, and the "salient facts" set forth in Justice Taylor's majority opinion showed that the AMA website "supplied [Meklir] with information that defendant Brown was only board-certified in general surgery and that there is no vascular surgery board certification. Further, counsel consulted Dr. Zakharia, his expert, who reiterated that there is no vascular surgery board certification." *Id.* at 600.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

certifications must match in all cases or only those in which the board certifications are relevant to the alleged malpractice." *Id.*, n. 7. In a concurring opinion joined by Justice Kelly, Justice Cavanagh found that a "proper reading of the statute [MCL 600.2169] indicates that board certifications and specialties must match *only* when the board certification or specialty is relevant to the alleged malpractice at issue." *Id.* at 601. Justice Weaver's concurring opinion held that MCL 600.2169 "requires that a standard-of-care expert's board certifications and specialties match those of the defendant only where the specialty or board certification is appropriate for (correct for the purpose of explaining) the standard of care to which the expert will be testifying in the case." *Id.*

Grossman establishes that the trial court below understood and properly applied MCL 600.2912d(1) and MCL 600.2169. At the initial stage of the litigation, defendants moved for summary disposition, arguing that Dr. Casamassima's affidavit of merit did not meet the requirements of MCL 600.2912d(1).[2] The trial court denied the motion, ruling that because the defendant physicians and Dr. Casamassima "share[d] a board certified specialization in pediatrics," the plaintiffs' attorney reasonably believed that Dr. Casamassima's qualifications met the requirements of MCL 600.2169.[3] The trial court made it explicitly clear, however, that it was only ruling with respect to the sufficiency of plaintiffs' affidavit of merit under MCL 600.2912d, and that the issue of whether Dr. Casamassima ***was actually qualified to testify at trial under MCL 600.2169 was a separate issue which "obviously" would be raised by defendants "at a later time."***[4] Thus, plaintiffs had received clear notice that the "more demanding" standard of § 2169 referred to by this Court in *Grossman* would be applied at the time of trial.

---

[2] Exhibit L to Defendants' Application for Leave to Appeal, docket # 124994.
[3] Exhibit M to Defendants' Application for Leave to Appeal, docket # 124994, p. 12.
[4] Exhibit M to Defendants' Application for Leave to Appeal, docket # 124994, pp. 12-13.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

The impact of this Court's separate decision in *Halloran v. Bahn, supra,* must be considered with reference to the claim of error asserted in plaintiffs' Cross-Application. Plaintiffs contend that the trial court below erred in demanding an "exact match" of Dr. Custer's board certifications. Plaintiff argues that "[c]ontrary to The (sic) Court of Appeals ruling in *Tate* [*v. Detroit Receiving Hospital,* 249 Mich. App. 212, 642 N.W.2d 346 (2002)], Judge Talbot and Judge Meter agreed with the trial court when the trial court required the plaintiffs' expert to be not only be (sic) board certified in Pediatrics, but also practice in the subspecialty of critical care."[5] Actually, the trial court's specific ruling was that, after careful review of Dr. Casamassima's "qualifications" and his admission that he had "no experience with pediatric critical care within one year prior to the injury complained of," Dr. Casamassima "did not devote the majority of his time within the year preceding the injury to the same active clinical specialty as Dr. Custer or the staff of the pediatric intensive care unit."[6] ***In other words, the trial court did not hold that Dr. Casamassima was unqualified under sec. 2169 because he was not board certified in the subspecialty of pediatric critical care medicine; rather, Dr. Casamassima was unqualified under the statute because, in the year preceding the injury complained of, Dr. Casamassima did not practice the clinical specialty at issue in the case, i.e., pediatric critical care medicine.***

In *Halloran, supra,* defendant Dr. Bhan was board certified in internal medicine by the American Board of Internal Medicine. *Id.*, 470 Mich. at 575. He also had a certificate of added qualification (from the same board) in critical care medicine. Plaintiff's proffered expert, Dr. Gallagher, was board certified in anesthesiology by the

[5] Plaintiffs' Cross-Application, pp. 14-15.
[6] (T, 9/14/01, p. 31), appended to Defendants' Application for Leave to Appeal, docket #124994 at Exhibit P.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

American Board of Anesthesiology and had received (from that same board) a certificate of added qualification in critical care medicine. *Id.* The allegations of malpractice concerned negligent treatment of plaintiff's decedent's renal failure and subsequent cardiac arrest; it was ***"not disputed that Bhan was practicing critical care medicine at the time of the event in question."*** *Id.* at 575, (emphasis added). The parties did not dispute that the subspecialty certification was not a "board certification" for purposes of the statute. *Id.*

The primary holding in Chief Justice Corrigan's majority opinion was that MCL 600.2169(1)(a) requires that an expert witness share the same board certification as the party against whom or on whose behalf the testimony is offered. *Id.* at 574. The decision overruled the underlying majority Court of Appeals decision that it was sufficient if the expert witness share only the same subspecialty, but not the same board certification, indicating that such an argument "runs contrary to the plain language of the statute." *Id.* at 578. Finding that Dr. Gallagher was not qualified under MCL 600.2169(1)(a) ("However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty."), the majority had no reason to construe the subsequent provision upon which the trial court in the instant case relied in finding Dr. Casamassima unqualified, MCL 600.2169(1)(b)(i) (in the year preceding the date of the alleged injury, a proffered expert must have devoted a majority of his or her professional time to the "active clinical practice of the same health profession . . . and, if that party is a specialist, to the active clinical practice of that specialty.").

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

Thus, the trial court's ruling below was in no way inconsistent with the majority ruling in *Halloran.* Moreover, the ruling below was not inconsistent with the analyses set forth in the dissenting opinions. Joined by Justice Cavanaugh, Justice Weaver dissented, stating her conclusion that it was "not clear" from the record whether Dr. Bahn was practicing internal medicine or critical care medicine at the time of the alleged malpractice. *Id.* at 580. Noting the language in sec. 2169(1) regarding the "appropriate" standard of care, the significance of whether Bhan was practicing internal medicine or critical care medicine at the time of the alleged malpractice was "obvious." *Id.* at 581. Had defendant Bhan been practicing critical care medicine at the time of the alleged malpractice, under Justice Weaver's analysis Dr. Gallagher presumably would have been qualified to testify under the statute. Similarly, Justice Kelly concluded that, since defendant did not dispute that critical care was the relevant area of specialization, plaintiff's proposed expert was qualified under the statute. *Id.* at 584, 592.

In the instant case, the trial court properly determined that the relevant area of specialization was pediatric critical care medicine.[7] Plaintiffs did not dispute this in the trial court, but rather did so only later, in the Court of Appeals, after the release of the Court of Appeals' decision in *Tate v. Detroit Receiving Hospital,* 249 Mich. App. 212, 642 N.W.2d 346 (2002). As is set forth in defendants' brief in response to plaintiffs' Cross-Application, the notion that this case is about general pediatric care and general pediatric maneuvers is simply a wild distortion of the trial court record and plaintiffs' own proffered expert's testimony. Austin Woodard was a desperately ill child who required critical care treatment including ventilatory support. When he was examined by

[7] (T, 9/14/01, p. 31), appended to Defendants' Application for Leave to Appeal, docket #124994 at Exhibit P.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

his "general" pediatrician on 1/30/97, that physician promptly placed Austin in an ambulance to take him to the PICU at Mott Children's Hospital, an obvious indication that his condition was such that Austin required a level of care far beyond the scope of "general" pediatrics. Moreover, Dr. Casamassima, like everyone else, had no clue as to the cause of Austin's femur fractures, and merely surmised and conjectured that they may have been caused during intubation or placement of arterial and venous lines. These are hardly "general" pediatric maneuvers, and a review of this record renders any argument that the care Austin was receiving at the time of the alleged injury was anything than pediatric critical care medicine utterly, hopelessly unpersuasive.

For reasons stated herein and in defendants' original Brief in Response to Plaintiffs' Cross-Application, the trial court properly found that Dr. Casamassima did not devote the majority of his professional time in the year prior to the alleged injury to the practice of the relevant specialty, pediatric intensive care medicine, and therefore was unqualified to testify under MCL 600.2169(1). Because the majority opinion of the Court of Appeals dealing with this issue rightly affirmed the trial court's ruling, Plaintiffs' Cross-Application should be denied.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

RELIEF REQUESTED

For the reasons stated in this Response, this court is requested to deny the Cross-Application for Leave.

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC

BY: 

KEVIN P. HANBURY (P39468)
Attorney for Defendants/Cross-Appellees
30850 Telegraph Road/Suite 200
Bingham Farms, MI 48025
(248) 646-1514

DATED: November 3, 2004

HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC • THE CARNEL BUILDING • 30850 TELEGRAPH ROAD, SUITE 200 • BINGHAM FARMS, MICHIGAN 48025 • (248) 646-1514

PROOF OF SERVICE

STATE OF MICHIGAN)
ss.
COUNTY OF OAKLAND)

ELAINE MOORE, being first duly sworn, deposes and states that she is employed by the law firm of HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC, and that on November 4, 2003, she served a copy of Defendants/Cross-Appellees Supplemental Argument RE: Plaintiffs/Cross-Appellants' Application for Leave to Appeal and this Proof of Service upon Craig L. Nemier, 37000 Grand River Avenue, Suite 300, Farmington Hills, MI 48335 by placing same in a United States Mail receptacle, properly addressed with postage fully prepaid thereon.

ELAINE MOORE

Subscribed and sworn to before
me on November 4, 2004.

Judith A. Cowan
Oakland County Notary Public
My Commission Expires: 01/30/05